STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant

v

Supreme Court No. 156828
Court of Appeals No. 331233
Circuit Court No. 15-004688-FH
(Jackson County)

STANLEY LYLE NICHOLSON,
Defendant-Appellee.
_____/

DEFENDANT-APPELLEE'S ANSWER IN OPPOSITION TO PEOPLE'S APPLICATION FOR LEAVE TO APPEAL

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JURISDICTIONAL STATEMENT

Defendant-Appellant Stanley Nicholson was convicted after a jury trial in the Circuit Court for Jackson County and sentenced by the trial court. He filed a timely claim of appeal from his criminal conviction on January 14, 2016.

The Court of Appeals decided this case in an unpublished opinion dated October 5, 2017 (No. 331233).

On November 30, 2017 the People filed their Application for Leave to Appeal. This Court has jurisdiction to consider their application under MCR 7.303(B)(1).

WHY LEAVE SHOULD NOT BE GRANTED

There are three reasons why leave should NOT be granted in this case.

- First, the court of appeals decision was a correct interpretation of the law and applicable statutes. A federal border patrol agent is not a "public officer" for the purposes of charging the common law crime of misconduct in office.
- Second, the court of appeals decision was the right result on the facts of this case. The prosecutor failed to prove that Nicholson acted with the required "corrupt intent." And, the trial court found that Nicholson had been entrapped by estoppel after an evidentiary hearing. The case should have been dismissed before trial.
- Third, the court of appeals decision is unpublished and limited to the unique facts of that case. It does not raise an issue that involves a legal principle of major significance to the state's jurisprudence. Nor is the court of appeals decision clearly erroneous that will cause a material injustice to anyone. The People's application does not meet any of the grounds required by MCR 7.305 (B) for granting leave to appeal.

Stanley Nicholson respectfully requests that this Court deny leave to appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. The first element of misconduct in office is that the defendant must be a "public officer." Nicholson was a United States Border Patrol agent, not a Michigan law enforcement officer. The court of appeals correctly found that his position did not fall within any statutory or case law definition of a "public officer." Since the court of appeals correctly decided that the misconduct in office charge should have been dismissed prior to trial and did it apply the appropriate remedy by vacating Nicholson's conviction?

Defendant-Appellee answers: YES
The Court of Appeals answers: YES
Plaintiff-Appellant answers: NO

II. The court of appeals reached the right result here two other reasons: 1) the prosecutor failed to present evidence on the intent element of misconduct in office by not proving Nicholson acted with "corrupt intent." 2) After an evidentiary hearing the trial court found that Nicholson proved entrapment by estoppel, but erroneously submitted that issue to the jury instead of dismissing the case. Since the integrity of the misconduct in office conviction was severely undercut did the court of appeals apply the right remedy by vacating Nicholson's conviction?

Defendant-Appellee answers: YES
The Court of Appeals answers: YES
Plaintiff-Appellant answers: NO

COUNTER-STATEMENT OF MATERIAL FACTS

The State charged Defendant-Appellant Stanley Nicholson with the common law offense of Misconduct in Office [MCL 750.505] for accepting a thermometer from Michigan State Police (MSP) officer Ziecina during a search warrant execution at 6575 Ann Arbor Road, Leoni Township, Michigan as well as Larceny in a Building [MCL 750.360] involving the same item. The jury acquitted him of the Larceny in a Building charge, but convicted him of the Misconduct in Office count. (III, 123).[1] The trial court sentenced Nicholson to one year probation with 40 hours of community service. (S, 7).[2] As of the date of this Answer, Nicholson has already completed his sentence.

On December 23, 2014 Stanley Nicholson was a U.S. Border Patrol agent assigned to the MSP Hometown Security Team (HST). (III, 25). He had been on the team for six weeks and his primary mission was to prevent terrorism and weapons from coming into the country. (III, 26). His secondary mission was to detect, detain, and stop illegal immigration as well as gather intelligence for the Border Patrol. (III, 26). He was not trained in Michigan law, nor was his job to enforce Michigan law. (III, 26). He took his orders from the Michigan State Police and deferred to their expertise in Michigan law enforcement matters. (III, 277).

At the first house where the search warrant was executed, Nicholson was assigned to be perimeter security when the entry into the house was made by the

[1] III refers to pages in Volume III of the trial transcript dated September 23, 2015.
[2] S, refers to pages in the Sentencing Transcript dated December 3, 2015.

MSP officers. (III, 29). While he was taking a break in the garage with MSP officers Schreiber and Carpenter, and motor carrier officer Morgan, MSP officer Ziecina[3] came in with a round object in his hand. (III, 30). He gave it to Nicholson and said that he had heard Nicholson was a tinkerer of sorts and thought he could make a plaque or something like a frame to go around it. (III, 31, 33). MSP officer Schreiber mentioned that the entire residence was going to be seized and everything that did not have an evidentiary value would be thrown away. (III, 31). Nicholson had no reason to believe that Ziecina was lying to him about taking the thermometer and making something nice out of it. (III, 35). And, he was pretty sure that Schreiber said that a dumpster would be brought in for the stuff that would be thrown away. (II, 179, 180;[4] III, 31). No one in the garage contradicted what Schreiber said and so Nicholson believed him. (III, 32). Nicholson scanned the faces of everyone in the garage to be sure what the situation was and no one gave any indication that he would not be allowed to take the thermometer. (III, 35). Since Nicholson had never been in this situation before, he believed the MSP officers that the thermometer was junk and that he could take it. (III, 35).

The thermometer was about the size of a grapefruit, dirty, completely discolored, and it had a rusty greenish metal frame. (II, 100-101; III, 32, 34). It looked like it had been sitting out in the yard and that is why Nicholson thought it looked like trash. (II, 100, 179, 102, 184-183; III, 32-33).

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[3] Ziecina's name is misspelled throughout the trial transcript as Zicina.
[4] II refers to pages in Volume II of the trial transcript dated September 22, 2015.

A day or two after the search warrant execution, Nicholson tried to clean the lens of the thermometer with a dremel tool that had a special tip and some polishing compound. (III, 36). He started to clean the lens at its dirtiest point, but he held the dremel tool in its position for too long and it burrowed through the lens making the thermometer completely useless. (II, 100, 173; III, 36, 51). Nicholson threw it in the trash and gave it no other thought. (II, 100, 174; III, 37, 47, 51).

On December 30, 2014 when Detective Furlong came to his house to speak to him, Nicholson assumed it was about the other Border Patrol Officer – Terry Bruce. (III, 37). He was puzzled when Furlong began his questioning with a statement that he had reason to believe that Nicholson had an item, a thermometer/barometer. (II, 100; III, 38). At that point Nicholson realized that it was not a piece of trash, but rather it was someone else's property and he was responsible for it. (III, 39). He did not realize it was wrong to accept the thermometer and believed under the circumstances that he had permission to take it. (III, 39, 42).

The prosecution introduced evidence about the search warrant execution at the two houses on Ann Arbor Road and what they didn't see. MSP officer Teachout, who tabulated the items seized on the raid (I, 130-131, 142),[5] could not identify Nicholson as one of the Border Patrol agents (I, 129, 141), and he did not see anyone take anything for personal use. (I, 137). MSP sergeant Temelko

[5] I refers to pages in Volume I of the trial transcript dated September 21, 2015.

participated in the initial search of the second residence. He did not see anyone take anything for personal use. (II, 109). MSP officer Schreiber, who was the K-9 handler at the search warrant execution (I, 167, 171, 178-179), did not see anyone take any property for personal use. (I, 172-173). MSP assistant post commander Cook, who was in charge of JNET[6] at the time (I, 189-190), denied seeing or knowing of anyone taking any property. (I, 194, 198).

Teachout explained that they were looking for evidence and high value items purchased with drug money, which could be auctioned. (I, 148-150). Cook admitted describing many things as "junk" because they had no value to what they were doing at the house. (I, 196). He said that junk did not have a specific meaning in his mind and offered the example that to him anything except a Harley Davidson motorcycle was "junk." (I, 210). In other words, to the MSP, junk means useless to the MSP. (I, 211). Schreiber denied saying that the leftover items would be tossed into a dumpster because they were trash. (I, 186, 174). He did remember seeing Ziecina coming in to the garage, but denied seeing him hand Nicholson anything. (I, 184).

Border Patrol agent Migliore, who was part of HST with Nicholson and Bruce (I, 218-220), admitted that he didn't really know what Nicholson had in his hand and doesn't know what he did with it. (I, 231).

Other facts will be added as needed to the arguments, infra.

[6] JNET: Jackson Narcotics Enforcement Team.

ARGUMENTS

I.

The first element of misconduct in office is that the defendant must be a "public officer." Nicholson was a United States Border Patrol agent, not a Michigan law enforcement officer. The court of appeals accurately found that his position did not fall within either the statutory or case law definition of a "public officer." The court correctly held that the misconduct in office charge should have been dismissed and properly vacated Nicholson's conviction.

The common law crime of "misconduct in office" requires that the defendant be a "public officer." As a United States Border Patrol agent temporarily assigned to a Michigan State Police task force, Nicholson did not meet the definition of "public officer." After reviewing the applicable law, the Court of Appeals correctly determined that as a U.S. Border Patrol agent in a temporary assignment to the MSP, Nicholson was not a "public officer" and that the trial court should have been dismissed that charge prior to trial.[7] To remedy this error, the court appropriately vacated his conviction.

Standard of Review

The determination of whether the defendant is a "public officer" is a question of law that is reviewed de novo. *People v Coutu [Coutu I]*, 459 Mich. 348,

[7] This issue was preserved for appellate review. The defendant joined in the co-defendant's motion to dismiss based on the fact a U.S. Border Patrol agent was not a public officer. (EH, 4-10).[7] In the motion for a directed verdict at the end of the trial, counsel adopted the co-defendant's argument that the prosecutor did not prove that the border patrol agents were "public officers" for the purposes of misconduct in office. (III, 4-6, 7).

353; 589 NW2d 458 (1999). The interpretation and application of statutes is also a question of law that is reviewed de novo. *Id.*

Misconduct in Office

The elements of the common-law offense of misconduct in office are:

1) The person must be a public officer;

2) The conduct must be in the exercise of the duties of the office or done under the color of the office;

3) The acts were malfeasance or misfeasance; and

4) The acts must be corrupt behavior. [*People v Carlin (On Remand)*, 239 Mich.App. 49, 64; 607 NW2d 733 (1999)].

The first question is whether Nicholson, as a U.S. Border Patrol Agent temporarily assigned to the MSP Hometown Security Team, is a "public officer" for the purposes of a misconduct in office charge? The court of appeals accurately answered that question as "no."

A Border Patrol Agent is not a Public Officer

In *Coutu I*, supra at 354 this Court identified five elements to assist courts in determining whether an individual is a "public officer" for the common law offense of misconduct in office. To be a "public officer" the person's position must satisfy all of the following criteria:

1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature;

2) It must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public;

3) The powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority;

4) The duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; and

5) It must have some permanency and continuity, and not be only temporary or occasional. *Coutu I,* supra at 354.

This test originated in *State ex rel. Barney v Hawkins*, 79 Mont. 506; 257 P. 411, 418 (1927) and was adopted by this Court in *People v Freedland*, 308 Mich. 449, 457-458; 14 NW2d 62 (1944) where it was used to determine whether an accounts examiner of the Michigan State Sales Tax Division was a public officer for the purposes of charging him with the felony for accepting a bribe.[8] In 1999, the Court applied this test to the definition of public officer in *Coutu I* to determine if a deputy sheriff was a public officer for the purposes of the common-law offense of misconduct in office.

[8] It was a felony for a public officer to accept a bribe, but only a misdemeanor for a public employee to accept a bribe. *Freedland*, supra at 458-459. The Court determined he was not a public officer, but rather a public employee.

Other things can be considered for the purposes of determining whether a defendant is a public officer such as whether there is an oath and a bond requirement. *People ex rel. Throop v Langdon*, 40 Mich. 673 (1879); MCL 15.181(e) [statutory definition of public officer[9]]; and MCL 15.181(d) [statutory definition of public employee[10]].

Applying the test to Nicholson's position as a U.S. Border Patrol Agent, it is clear that Nicholson's position was not created by the Michigan Constitution or by the Michigan legislature or created by a municipality or other body through authority conferred by the Michigan legislature. His job did not involve the delegation of a portion of the sovereign power of Michigan government. The Michigan legislature did not confer any powers on the United States Border Patrol nor did it define its duties directly or impliedly. And Nicholson's presence with the Hometown Security Team was only temporary and not permanent. While the test articulated by the Montana Supreme Court in 1927, did not specify the state constitution or state legislature, the test it developed was based upon state law and

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[9] (e) "Public officer" means a person who is elected or appointed to any of the following:
(*i*) An office established by the state constitution of 1963.
(*ii*) A public office of a city, village, township, or county in this state.
(*iii*) A department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of this state or a city, village, township, or county in this state. See also MCL 750.368 (d).

[10] (d) "Public employee" means an employee of this state, an employee of a city, village, township, or county of this state, or an employee of a department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of this state or of a city, village, township, or county in this state, but does not include a person whose employment results from election or appointment. See also MCL 750.368 (c).

state legislative powers. See *Hawkins*, supra at 413-418.[11] The question in *Hawkins* was one of Montana state law regarding the interpretation of a Montana state crime. In this case the question is one of Michigan state law regarding the interpretation of an element of a Michigan common law crime. The Michigan misconduct in office offense is a Michigan offense and it is logical that where the offense requires the defendant be a "public officer" it means that he must be a "public officer" as that is defined by Michigan law. Moreover, the idea that the *Coutu I* test means the Michigan Constitution and law is supported by MCL 15.181(e) defining what a "public officer" is. That statute specifically refers to the Michigan Constitution and the laws of "this state." The Court of Appeals analysis on this point was valid.

The authority of a United States Border Patrol agent is defined in 8 U.S.C. § 1357 as having the power to interrogate any alien or person believed to be an alien; arrest any alien who is entering or attempting to enter the United States in violation of any immigration laws, board and search any vessel, aircraft, conveyance, or vehicle within a reasonable distance from the border to prevent the entry of illegal aliens; to arrest anyone for felonies cognizable under the any law of the United States regulating aliens, and for federal offenses. A United States Border Patrol agent does not have the authority to enforce Michigan law. This fact is supported

[11] Citing law from Rhode Island, Mississippi, Missouri, South Carolina, Nevada, North Carolina, Utah, Mississippi, California, Pennsylvania, Massachusetts, Georgia, Ohio, New York, Michigan, Oklahoma, Texas, Kentucky, Georgia, Iowa, Maine, Connecticut, Illinois, New Jersey, Alabama, and Maryland.

by the evidence at trial that U.S. Border Patrol agents do not have police officer status in Michigan (I, 232); that U.S. Border Patrol agents were not deputized in Michigan by anyone (I, 80, 141, 205); and none of the U.S. Border Patrol agents were members of any Michigan police organization (I, 177).

The evidence at trial was consistent with MCL 764.15d governing the limited authority of federal law enforcement officers to act in Michigan. Since the U.S. Border Patrol agents were not licensed Michigan police officers, they were not to initiate any stops on their own. (II, 115). They had to have local Michigan police do that. (I, 241, 243; II, 115). This is because the Border Patrol agents have no authority to enforce Michigan law. (I, 228). Nicholson as a U.S. Border Patrol agent worked with HST to help with any immigration issues and to bring back intelligence to the Border Patrol for analysis. (I, 227; III, 26). Nicholson's position does not fit the definition of a "public officer" as it is defined in *Coutu I*, *Freedland*, and MCL 15.181(e). The Court of Appeals decision is in line with applicable law that Nicholson was not a "public officer."

Border Patrol Agent is not a Police Officer

In *Coutu I*, this Court found that a deputy sheriff was a public officer for the purposes of the misconduct in office offense because the legislature provided for the creation of deputy sheriffs; deputy sheriff's exercise sovereign power while engaged in the discretionary discharge of their duties; the legislature defined the powers and duties of deputy sheriffs; the legislature authorized the appointment of deputy sheriffs, an inferior/subordinate office to that of sheriff; deputy sheriffs are

generally positions of permanent employment; and they are required to take an oath before entering upon their duties of office. *Coutu I,* at 355-356. In *People v Hardrick*, 258 Mich.App. 238, 245; 671 NW2d 548 (2003) the Court of Appeals found that a police officer is a public officer for the purposes of evaluating a charge of misconduct in office, citing *Coutu I,* supra. But under the applicable law defining a police officer, that term does not include a United States Border Patrol agent.

The Michigan Commission on Law Enforcement Standards Act defines a police officer at MCL 28.602(l):

> (l) "Police officer" or "law enforcement officer" means, unless the context requires otherwise, any of the following:
> (*i*) A regularly employed member of a law enforcement agency authorized and established by law, including common law, who is responsible for the prevention and detection of crime and the enforcement of the general criminal laws of this state. Police officer or law enforcement officer does not include a person serving solely because he or she occupies any other office or position.
> (*ii*) A law enforcement officer of a Michigan Indian tribal police force, subject to the limitations set forth in section 9(7).
> (*iii*) The sergeant at arms or any assistant sergeant at arms of either house of the legislature who is commissioned as a police officer by that respective house of the legislature as provided by the legislative sergeant at arms police powers act, 2001 PA 185, MCL 7.381 to 4.382.
> (*iv*) A law enforcement officer of a multicounty metropolitan district, subject to the limitations of section 9(8).
> (*v*) A county prosecuting attorney's investigator sworn and fully empowered by the sheriff of that county.
> (vi) A fire arson investigator from a fire department within a village, city, township, or county who is sworn and fully empowered by the chief of police of that village, city, township, or county. [Emphasis added].

As a U.S. Border Patrol agent Nicholson does not fall within this definition. He is not regularly employed by any law enforcement agency responsible for enforcement of the general criminal laws in Michigan. He is not a member of a Michigan Indian tribal police force or a sergeant at arms for the legislature. He is not an investigator for a prosecuting attorney's office or a fire arson investigator.

While HST seems like it might fit within MCL 28.609(8),[12] Nicholson still does not fall within the definition of a law enforcement officer because he did not meet or exceed the minimum standards for police officer certification, he was not deputized, and there was no written agreement with the U.S. Border Patrol that was on file with the Commission [Michigan Commission on Law Enforcement Standards]. As a United States Border Patrol agent, Nicholson does not fall within the definition of a Michigan law enforcement officer.

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[12] (8) A law enforcement officer of a multicounty metropolitan district, other than a law enforcement officer employed by a law enforcement agency created under the public body law enforcement agency act, is not empowered to exercise the authority of a peace officer under the laws of this state and shall not be employed in a position for which peace officer authority is granted under the laws of this state unless all of the following requirements are met:
(a) The law enforcement officer has met or exceeded minimum standards for certification under this act.
(b) The law enforcement officer is deputized by the sheriff or sheriffs of the county or counties in which the land of the multicounty metropolitan district employing the law enforcement officer is located and in which the law enforcement officer will work, pursuant to section 70 of 1846 RS 14, MCL 51.70.
(c) The deputation or appointment of the law enforcement officer is made pursuant to a written agreement that includes terms the deputizing authority under subdivision (b) may require between the state or local law enforcement agency and the governing board of the multicounty metropolitan district employing the law enforcement officer.
(d) The written agreement described in subdivision (c) is filed with the commission. [Emphasis added]

There is a separate Michigan statute defining when a federal law enforcement officer can make an arrest for a state law offense, but that statute does not make a U.S. Border Patrol agent a police officer. Under MCL 764.15d a federal law enforcement officer may make an arrest to enforce state law only if all of the following conditions are met:

> (a) The officer is authorized under federal law to arrest a person, with or without a warrant, for a violation of a federal statute.
> (b) The officer is authorized by federal law to carry a firearm in the performance of his or her duties.
> (c) One or more of the following apply:
> (i) The officer possesses a state warrant for the arrest of a person for the commission of a felony.
> (ii) The officer has received positive information from an authoritative source, in writing or by telegraph, telephone, teletype, radio, computer, or other means, that another federal law enforcement officer or a peace officer possesses a state warrant for the arrest of the person for the commission of a felony.
> (iii) The officer is participating in a join investigation conducted by a federal agency and a state or local law enforcement agency.
> (iv) The officer is acting pursuant to the request of a state or local law enforcement officer or agency.
> (v) The officer is responding to an emergency.

While MCL 764.15d addresses when a federal officer can make an arrest for the violation of a Michigan state law offense, it does not make federal law enforcement officers into Michigan police officers or public officers because there are separate statutes that define what a Michigan police officer/law enforcement officer is [MCL 28.602(l)] and what a Michigan public officer is [MCL 15.181(e)].

The evidence at trial showed that U.S. Border Patrol agents did not have police officer status in Michigan: they were not deputized in Michigan by anyone (I, 80, 141, 205); they were not licensed Michigan police officers (II, 115); they

could not initiate any stops on their own (II, 115); they have no authority to enforce Michigan law (I, 228); and one Michigan State police officer described the Border Patrol agents function with HST as just riding along with HST members. (I, 128-129). Nicholson's assignment with HST was to help with any immigration issues and to bring back intelligence to the Border Patrol. (I, 227; III, 26). Finally, the most telling evidence that the Border Patrol agents were not considered Michigan law enforcement officers is that during the search warrant raid, they were relegated to perimeter security and helping load up the items other officers determined were to be seized. (I, 221-222; II, 80; III, 29). Nicholson was not a "police officer" who could be considered a "public officer."

In his position as a United States Border Patrol agent, Nicholson did not meet the definition of a "public officer" to satisfy the first element of the common law offense of misconduct in office. *Coutu I* and *Freedland*, supra. His position also does not fall with the definition of "public officer" set forth in MCL 15.181(e) or a law enforcement officer set forth in MCL 28.602(l). There is nothing in either 8 U.S.C. § 1357 or MCL 764.15d that confers authority on a U.S. Border Patrol agent to act as a Michigan police officer. Since Nicholson's position as a U.S. Border Patrol agent does not fall within any definition of "public officer" for the common law crime of misconduct in office, the court of appeals accurately held that the trial court erred when it denied the pre-trial motion to dismiss that count and properly vacated Nicholson's conviction and sentence. There is no basis for granting leave to appeal because the Court of Appeals correctly decided this case.

II.

The prosecutor did not prove that the defendant acted with "corrupt intent." Nicholson had a good faith belief that he could take the thermometer that Trooper Ziecina gave him because it appeared to be junk. The definition of corrupt intent requires more than this to satisfy that element. Further the trial court found entrapment by estoppel and erred when it did not dismiss this count prior to trial. The Court of Appeals reached the right result in this case when it decided to vacate his conviction.

The court of appeals reached the right result here for two other reasons:

1) The prosecutor failed to present sufficient evidence on the intent element of misconduct in office. The common law crime of "misconduct in office" requires that the defendant be a public officer and that he acted with "corrupt intent." The proofs presented at trial did not show that Nicholson acted with the required "corrupt intent."

2) The trial court found that Nicholson had sustained his burden of proof on all of the elements of entrapment by estoppel after an evidentiary hearing. (EH, 47-49). But the trial court erroneously submitted the issue to the jury instead of dismissing the case as required by *People v Woods*, 241 Mich.App. 545, 555; 616 NW2d 211 (2000). (EH, 49). Since the misconduct in office charge never should have been submitted to the jury in the first place, the court of appeals properly vacated Nicholson's conviction on appeal.

(1) INSUFFICIENT EVIDENCE

Standard of Review

An appellate court reviews de novo a defendant's challenge to the sufficiency of the evidence to support his convictions. *People v Meissner*, 294 Mich.App. 438, 452; 812 NW2d 37 (2011). To determine whether sufficient evidence was presented to the jury, this Court reviews the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Gaines*, 306 Mich.App. 289, 296; 856 NW2d 22 (2014). "A trier of fact may make reasonable inference from the facts, if the inferences are supported by direct or circumstantial evidence." *People v Legg*, 197 Mich.App. 131, 132; 494 NW2d 797 (1992).

Misconduct in Office

The elements of the common-law offense of misconduct in office are: 1) The person must be a public officer; 2) The conduct must be in the exercise of the duties of the office or done under the color of the office; 3) The acts were malfeasance or misfeasance; and 4) The acts must be corrupt behavior. *Carlin*, supra at 64. This offense is defined as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." *People v Coutu (On Remand)*, 235 Mich.App. 695, 705; 599 NW2d 556 (1999) [*Coutu II],* quoting Perkins & Boyce, Criminal Law (3d ed.), p. 543.

"Malfeasance" is committing any act which is itself wrongful. *People v Perkins*, 268 Mich. 448, 456; 662 NW2d 727 (2003). "Misfeasance" is committing a lawful act in a wrongful manner. *Id.* Committing "acts of malfeasance or misfeasance are not enough to constitute misconduct in office. In the case of malfeasance and misfeasance, the offender also must act with corrupt intent. *Id.; Coutu II,* supra at 706.

The meaning of corrupt intent was defined in *Coutu II.* '"Corruption" in this context means a 'sense of depravity, perversion, or taint.'" *Id.* at 706, citing Perkins & Boyce at p. 542. "'Depravity' is defined as 'the state of being depraved' and 'depraved' is defined as 'morally corrupt or perverted.'" *Id.*, citing *Random House Webster's College Dictionary* (1997). "'Perversion' is 'the act of perverting,' and the term 'perverted' includes in its definition 'misguided; distorted; misinterpreted' and 'turned from what is considered right or true.'" *Coutu II*, supra at 706, citing *Random House Dictionary*. "The definition of 'taint' includes 'a trace of something bad or offensive.'" *Id.* The court used these definitions to conclude that "a corrupt intent can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer." *Coutu II*, supra at 706, citing Perkins & Boyce, p. 542.

Evidence insufficient to show corrupt intent

In this case, none of the Michigan State Police officers saw Nicholson, or anyone else take property for their own use. [Teachout (I, 137); Schreiber (I, 172-

173); Cook (I, 198); Temelko (II, 109)]. The only testimony regarding Nicholson's intent came from Nicholson who believed that since it was "junk" he could take it and try to fix it up. (III, 31-36). The notion that property, which was not seized as evidence or for forfeiture, was junk came from the atmosphere at the search warrant scene. David Cook, now an MSP assistant post commander, admitted calling the mechanic's creepers "junk" (I, 196). He also said that the DeWalt lights at the residence were junk and told the officer to not take them. (I, 202). To him the term "junk" meant that the items were useless to the MSP, i.e. had no value as evidence or for forfeiture. (I, 196, 203, 211). In explaining his definition of junk, he said that he rides motorcycles and that to him any motorcycle other than a Harley Davidson is junk. (I, 210).

Nicholson had never taken anything before and had no intent to take anything until the thermometer was given to him under circumstances where he believed it was going to be thrown away as junk. (III, 31-36). He did not take the thermometer off the wall, it was presented to him by MSP trooper Ziecina. (III, 31, 33). Ziecina referred to Nicholson's reputation as a tinkerer and invited him to make it into something nice. (III, 31). To the best of his recollection, Nicholson thought it was MSP trooper Schreiber who said that anything left behind would be thrown away because the entire residence was going to be seized. (III, 31). The thermometer looked like trash because it was a rusty greenish brown metal thermometer with the lens fogged over "like it had been sitting outside in the yard, very weathered, unkept." (III, 32-33). The combination of what was said and the

condition of it led Nicholson to believe that the thermometer was junk that was going to be thrown away. To be sure, he even scanned the faces in the garage to see if anyone disapproved and got no reaction or any indication that it was wrong to take it. (III, 32, 34). Nicholson believed MSP trooper Ziecina was doing something allowed when he gave him the thermometer. (III, 35).

On this record the evidence is insufficient to show that Nicholson had the necessary "corrupt intent" that is required for a conviction of the misconduct in office charge. Therefore, his conviction and sentence must be vacated and this case dismissed.

(2) ENTRAPMENT BY ESTOPPEL[13]

Standard of Review

An appellate court reviews the trial court's findings of fact for entrapment under the clearly erroneous standard. *People v Fyda*, 288 Mich.App. 446, 456; 793 NW2d 712 (2010). Findings of fact are clearly erroneous if this Court is left with the firm conviction that a mistake was made. *Id.* Whether entrapment occurred is a question of law that is reviewed de novo. *Id.*; *People v Milstead*, 250 Mich.App. 391, 397; 648 NW2d 648 (2002).

[13] This issue was preserved by Nicholson filing a motion for a hearing on entrapment by estoppel. An evidentiary hearing was held on September 11, 2015. (EH, 1-49). Prior to trial he filed a motion to dismiss the case based upon the trial court's finding entrapment by estoppel and he objected to the issue being submitted to the jury. (I, 4-15).

Entrapment by Estoppel

The defense of entrapment by estoppel was first recognized in the *Woods* case, supra. The elements for entrapment by estoppel in Michigan were developed by combining the test articulated by the United States Court of Appeals for the Third Circuit in *United States v West Indies Transport, Inc,* 127 F.3d 299, 313 (3rd Cir.1997), which was similar to that fashioned by both the Second and Tenth Circuit Courts of Appeal,[14] and the last element of the test from the Sixth Circuit case of *United States v Levin*, 973 F.2d 463, 488 (6th Cir.1992). In Michigan, the elements of entrapment by estoppel are as follows:

1) A government official

2) Told the defendant that certain criminal conduct was legal,

3) The defendant actually relied on the government official's statements,

4) The defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statements, and

5) That given the defendant's reliance, the prosecution would be unfair.

Woods, supra at 558-559.

"In essence, it [entrapment by estoppel] applies when, acting with actual or apparent authority, a government official affirmatively assures the defendant that certain conduct is legal and the defendant reasonably believes that official." *United*

[14] See *United States v Abcasis*, 45 F.3d 39, 43 (2nd Cir.1995) and *United States v Nichols*, 21 F.3d 1016, 1018 (10th Cir.1994).

States v Howell, 37 F.3d 1197, 1204 (7th Cir.1994). The defendant has the burden of establishing by a preponderance of the evidence that he was entrapped. *People v Johnson*, 466 Mich. 491, 498; 647 NW2d 480 (2002).

The Entrapment Hearing

The sole witness at the entrapment hearing was Stanley Nicholson. He testified that he was with the United States Border Patrol and at the time of the December 23, 2014 search warrant execution, he was assigned to the MSP Hometown[15] Security Team. (EH, 24-25). He was assigned to work with the MSP troopers, look for items within the jurisdiction of the Border Patrol, and gather intelligence for his office. (EH, 25-26). He just followed what the Michigan Police did and deferred to their expertise on Michigan law – he took orders from them. (EH, 26).

He was standing in the garage of the first house that was searched along with Troopers Carpenter, Morgan, and Schreiber.[16] (EH, 28, 31-32). They were standing in a circle telling stories and enjoying the break from the search warrant when Trooper Ziecina walked in with a thermometer in his hand. (EH, 32-33). It was 3 to 4 inches in diameter, round, kind of a green rusty color to the metal with the face fogged over like it had been left in the yard. (EH, 33). Nicholson's Border Patrol colleague, Terry Bruce was with Ziecina. (EH, 33). Ziecina handed the

[15] In the evidentiary hearing transcript it is mistakenly referred to as "Homeland".
[16] In the Evidentiary Hearing transcript, Schreiber is misspelled as Schriver. The correct spelling is in the trial transcript at Volume I, page 166).

thermometer to Nicholson and either he or Bruce suggested that since Nicholson was a tinkerer that he could possibly frame the thermometer or make it look better than it did. (EH, 34). Ziecina commented that he thought the thermometer looked old and that it would be a thing of beauty if Nicholson could polish it up some. (EH, 34). This conversation took place in front of the other troopers and since Nicholson had only been with this group for six weeks, he looked at everyone to see if this was a test. (EH, 34). He did not get any look or indication that there would be anything wrong with taking it. (EH, 35-36).

He thought that Schreiber said that everything was either going to be seized or thrown away because the house was going to be seized. (EH, 35). Anything that the police did not take was going in the dumpster. (EH, 35). The thermometer was rusty, dirty, well-weathered, and looked like trash; it was not evidence. (EH, 36). Since Schreiber had been involved in so many search warrants before, he believed his representation that everything the police did not take was going into the dumpster. (EH, 37). He deferred to his judgment and there was nothing to indicate that Schreiber was joking. (EH, 37-38).

Relying on the comments and the fact that the thermometer appeared to be junk he took it to work on it and see if he could make it into something useful. (EH, 38). Nicholson had never taken anything during the time he was in the Border Patrol or while he was doing police work prior to going into the Border Patrol. (EH, 39). Under the circumstances with everyone standing around, he believed he had approval to take the thermometer. (EH, 39, 45-47).

The trial court made the following ruling finding entrapment by estoppel:

> THE COURT: Okay. Well, when I look – and we're talking about as far as this goes only the thermometer. When I look at the totality of the circumstances, the statement made that he could make something nice out if it suggesting to the Court at least that they were suggesting that he could take it with him, that was just going to be trash. These are State Police officers making these statements. It appears that it was an old, rusty thermometer. In good faith he thought if they don't have a problem with it and it's just going to be thrown out, that he could do it. I'll allow the estoppel – entrapment by estoppel –" (EH, 47-48).

After a discussion about whether it should apply to both counts with defense counsel, the following discussion occurred:

> "THE COURT: Actually, the more I think about it, if I'm going to have – if he's going to raise that defense at to the larceny, that really should apply to the –
> MR. TYLENDA (defense counsel): The misconduct.
> THE COURT: -- the misconduct also. I can't see why it wouldn't. I mean –
> MR. PATTERSON (prosecutor): If the Court is going to allow him to use that kind of defense, the only thing I was going to state is that it does not call for a dismissal of the charges. What it is –
> THE COURT: Oh, no. I totally agree with that, no. This is just a defense that he can raise at the time of – the time of trial.
> MR. PATTERSON: He gets a jury instruction that says you can raise –
> THE COURT: If you find these elements and you get instructions, as to the thermometer.
> MR. PATTERSON: Yes, Your Honor.
> THE COURT: Okay. And it will apply to both charges." (EH, 49).

The problem was that both the trial court and the prosecutor were wrong. Entrapment is a question of law for the trial court, NOT an issue that is submitted to the jury.

Entrapment by Estoppel Finding is not Erroneous

The evidence presented at the evidentiary hearing supports the trial court's finding of entrapment by estoppel. It was the combination of the statements of two government officials: MSP officer Ziecina, who gave Nicholson the thermometer with the suggestion the he could fix it up; MSP officer Schreiber, who told Nicholson that anything not seized by the police would be put in a dumpster and thrown away because the house was going to be seized; and the junk-like appearance of the thermometer that convinced Nicholson that it was okay to take the thermometer.

Nicholson actually relied on these statements due to the circumstances under which these statements were made. There were other officers present when Ziecina gave the thermometer to Nicholson and when both Ziecina and Schreiber made their statements. Plus, Ziecina was with the other Border Patrol agent, Terry Bruce when he came into the garage with the thermometer he gave to Nicholson. No one in the room gave any indication that there was a problem with accepting the thermometer.

His reliance was in good faith based upon the identity of the officials -- Michigan State Police officers, what they said, that they made their comments in front of other officers, and the condition of the thermometer itself.

Finally, Nicholson relied on statements made by the MSP officers he had worked with in the time he was with HST and to whom deferred on matters of

Michigan law. Under the circumstances of this case, it was unfair to prosecute him for accepting the thermometer from MSP officer Ziecina.

The trial court's ruling that there was entrapment by estoppel was correct based upon the facts presented at the evidentiary hearing. This case should never have gone to trial. The court of appeals in *Woods*, unequivocally held that entrapment by estoppel is not a question for the jury but rather is a question of law for the trial court. *Woods*, supra at p. 554. The same rule applies for the general defense of entrapment – it is a question of law for the trial court to decide, not a jury. *People v Jones*, 203 Mich.App. 384, 386; 513 NW2d 175 (1994); *People v D'Angelo*, 401 Mich. 167, 176-177; 257 NW2d 655 (1977). The reason for this is that entrapment is not a defense that negates an essential element of the charged crime, but instead it presents facts that are collateral to the crime and that justify barring the defendant's prosecution. *Jones*, supra, citing *People v Julliet*, (Brickley, J) 439 Mich. 34, 52; 475 NW2d 786 (1991). The trial court found entrapment by estoppel and the correct remedy was to dismiss the charges against Nicholson, not to send the issue to the jury. Therefore the court of appeals appropriately remedied this error by vacating Nicholson's conviction.

Here the court of appeals reached the right result given the lack of evidence of "corrupt intent" and that the trial court's finding of entrapment by estoppel was amply supported by the evidence. Since the court of appeals decision reached the right result, there is no basis for granting leave to appeal or disturbing the court of appeals decision.

SUMMARY

Prosecuting Nicholson for taking what appeared to be a dirty old junk thermometer home to try to fix up is fundamentally unfair when the totality of the circumstances involving the search warrant execution are examined. The criminal case against the Benjamin Scott, the occupant of the houses where the search warrants were executed was dismissed because the court ruled that crucial information was withheld that should be been in the search warrant. (II, 161).

Scott filed a civil case against the police due to the destruction of the houses and the numerous items that were missing after the police left. (II, 42, 51). At trial Scott described the condition of his houses as "destroyed" when he returned after the search warrants had been executed. (II, 41). His ceramic heaters were broken as was the glass in his coffee table. (II, 42). Light bulbs had been smashed and thrown in his washing machine. (II, 42, 45). There was dog food dumped all around the house. (II, 42, 45). His goods were strewn about the house and yard. (II, 44). He also testified that there were so many items missing after the execution of the search warrant that he "could spend the afternoon describing all the things that are missing." (II, 47). These missing items are not on the MSP tabulation sheets. (II, 47). Much more was missing than just the stool and the thermometer. (II, 50, 61-62).

When the case against Scott and the anticipated forfeiture 'went bad, it appears that Nicholson and his U.S. Border Patrol partner were singled out for

felony charges[17] because they were convenient scapegoats. This case never should have gone past the motion to dismiss. Since Nicholson's position does not meet any definition of "public officer" for the common law crime of misconduct in office, the trial court erred when it did not grant the motion to dismiss the misconduct in office count on that basis. After finding that Nicholson was entrapped, the proper remedy was to dismiss this case, but the trial court erroneously submitted that question to the jury. Finally, there was no evidence that Nicholson had for the requisite "corrupt intent" for him to be convicted of misconduct in office. The court of appeals correctly decided the question of whether Nicholson was a "public officer" and reached the right result in this case – vacating Nicholson's conviction.

Lastly, the court of appeals decision is unpublished and limited to the unique facts of that case. It does not involve a legal principle of major significance to the state's jurisprudence. The court of appeals decision is not clearly erroneous and it will not cause material injustice to anyone. The People's application for leave to appeal does not show that any of the grounds required by MCR 7.305 (B) for granting leave to appeal have been met. Nicholson asks that this Court deny leave to appeal in this case.

[17] Under 18 U.S.C. 654 the conduct in this case is a misdemeanor, if the necessary intent could be proven.

RELIEF

STANLEY NICHOLSON respectfully requests that this Honorable Court DENY the People's Application for Leave to Appeal.

Respectfully submitted,

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Dated: 20 December 2017

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

Supreme Court No. 156828
Court of Appeals No. 331233
Circuit Court No. 15-004688-FH

v

STANLEY LYLE NICHOLSON,
Defendant-Appellee
/

STATE OF ARIZONA }
} ss
COUNTY OF PIMA }

PROOF OF SERVICE

On the date below I e-served Defendant-Appellee's Answer in Opposition to the People's Application for Leave to Appeal on Plaintiff-Appellant:

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I declare that the above statements are true to the best of my information, knowledge, and belief.

/s/ Rosemary Gordon Pánuco
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Attorney for Defendant-Appellee Stanley Nicholson

Dated: 20 December 2017